

LIONEL M. NOEL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	DATE ISSUED: <u>MAR 11, 2003</u>
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying the Claim of Robert D. Kaplan,  
Administrative Law Judge, United States Department of Labor.

Scott N. Roberts, Groton, Connecticut, for claimant.

Conrad M. Cutcliffe (Cutcliffe Glavin & Archetto), Providence, Rhode Island,  
for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and  
GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying the Claim (01-LHC-1288) of Administrative Law Judge Robert D. Kaplan rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On May 31, 1989, claimant suffered a work-related injury to his lower back, while working for employer at Quonset Point, Rhode Island. Employer voluntarily paid claimant compensation for temporary total disability for the period from June 1, 1989 to July 26, 1990.

EX 2. Thereafter, claimant filed a claim for compensation under the Rhode Island Workers' Compensation Act (State Act) and was awarded "partial incapacity benefits" by the Rhode Island Workers' Compensation Court, pursuant to employer's agreement to pay

benefits. EX 7. In 1991, claimant requested that his future state benefits be commuted on the basis of a lump sum settlement of \$51,000, which was approved by the state on October 30, 1991. EX 8, 11. On November 29, 2000, claimant filed a claim for benefits for a loss in wage-earning capacity under Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21).

In his decision, the administrative law judge found that claimant's November 2000 claim is barred under the one-year statute of limitations set forth in Section 13(a) of the Act, 33 U.S.C. §913(a). The administrative law judge found that claimant was aware of the full extent of his disability by the time he settled his state claim, at the latest, but did not file a claim under the Act for another nine years. In addition, the administrative law judge rejected claimant's argument that the various chart notes of Dr. Hayes, including his last entry on October 17, 1990, constituted a timely claim, as the administrative law judge found there is no evidence that any medical report was ever filed with the district director. Finally, the administrative law judge rejected claimant's attempt to avoid the statute of limitations bar by arguing that employer was not prejudiced by claimant's failure to have filed a claim for nine years after his state claim was settled, finding that prejudice to employer, or lack thereof, is irrelevant to the inquiry into timeliness. Thus, the administrative law judge denied claimant compensation benefits and an attorney's fee award.

On appeal, claimant contends that the administrative law judge erred in finding that Section 13(a) bars his claim. Claimant also contends that the administrative law judge erred in not awarding him an attorney's fee based on his obtaining medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907. Employer responds, urging affirmance.

Section 13(a) provides that:

the right to compensation for disability... under this chapter shall be barred unless a claim therefore (sic) is filed within one year after the injury. . . If payment of compensation has been made without an award on account of such injury. . . a claim may be filed within one year after the date of the last payment. . . The time for filing a claim shall not begin to run until the employee. . . is aware, or by the exercise of reasonable diligence should have been aware of the relationship between the injury . . . and the employment.

33 U.S.C. §913(a).<sup>1</sup> Claimant does not contest the administrative law judge's finding

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<sup>1</sup>Pursuant to Section 30(f) of the Act, 33 U.S.C. §930(f), the time for filing a claim is tolled until employer files a first report of injury or the equivalent, pursuant to Section 30(a), 33 U.S.C. §930(a). In this case, employer filed its first report of injury on June 6, 1989, EX 1, and the tolling provision therefore is inapplicable.

regarding his 1991 date of awareness, which occurred after the last voluntary payment under the Act,<sup>2</sup> or his finding that no medical reports were filed with the district director. Claimant's sole contention on appeal is that employer was not prejudiced by his late filing, as it was fully aware that claimant sustained a loss in wage-earning capacity from his injury by virtue of the proceedings under the State Act.

We reject claimant's contention that the administrative law judge erred in finding that prejudice to employer is irrelevant to the issue of the timeliness of his claim. First, in contrast to Section 12 of the Act, Section 13 does not contain an explicit waiver of the time limitation where employer is not prejudiced by a late filing. *See* 33 U.S.C. §912(d)(2). Thus, no waiver can be imputed. *See Carter v. Director, OWCP*, 751 F.2d 1398, 17 BRBS 18(CRT) (D.C. Cir. 1985) (*inclusio unius est exclusio alterius*).

Moreover, the cases cited by claimant do not support the proposition that lack of prejudice to employer may excuse an untimely filed claim. Rather, they take a broad view of either the statute or the types of filings that can constitute a claim if timely filed. In *Ingalls Shipbuilding Div. v. Hollinhead*, 571 F.2d 272, 8 BRBS 159 (5<sup>th</sup> Cir. 1978), the Fifth Circuit affirmed the district court's finding that a state claim qualifies as a "suit brought at law or in admiralty to recover damages" under Section 13(d) of the Act which tolls the one-year statute of limitations during the pendency of the state claim. In tolling the statute of limitations during the pendency of the state claim, the district court stated:

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<sup>2</sup>Employer contended below that, pursuant to *Bath Iron Works Corp. v. Director, OWCP [Acord]*, 125 F.3d 18, 31BRBS 109(CRT) (1<sup>st</sup> Cir. 1997), the filing of a state claim does not toll the statute of limitations pursuant to Section 13(d), 33 U.S.C. §913(d). The administrative law judge rejected this contention on the ground that the portion of the First Circuit's decision discussing this issue was *dicta*. In any event, the administrative law judge noted that claimant's claim would not be timely in relation to the conclusion of the state claim. Decision and Order at 5 n. 3.

There is no evidence that Respondents suffered any prejudice due to the failure of Claimant to file his claim within the statutory period. Section 13 was not intended to provide a technical device to release the employer and insurer from their obligations, but merely to prevent prejudice to them from the entertainment of stale claims.

*Hollinhead*, 571 F.2d at 274-275, 8 BRBS at 161. Claimant finds in this statement support for his argument that a lack of prejudice alone will toll the statute of limitations. This proposition cannot be accepted. First, as noted above, *see* n.2, *supra*, the United States Court of Appeals for the First Circuit, within whose jurisdiction this case arises, has expressed its disagreement with *Hollinhead*, albeit in *dicta*. *Bath Iron Works Corp. v. Director, OWCP [Acord]*, 125 F.3d 18, 31 BRBS 109(CRT) (1<sup>st</sup> Cir. 1997). Second, claimant's claim is indeed stale. The fact that employer was aware of claimant's condition and the extent of his disability in 1991 does not mandate the conclusion that there is no prejudice from a claim filed nine years later, even if, as here, the parties were able to agree on the extent of claimant's lost earning capacity in the intervening years. The claim is still stale.

The other cases cited are also of no avail. In *Blackwell Constr. Co. v. Garrell*, 352 F.Supp. 192 (D.C.D.C. 1972), the widow of the deceased filed a timely claim with the employer, who had erroneously been paying death benefits to another woman who had wrongfully claimed to be the widow. The district court affirmed the deputy commissioner's finding that employer was estopped from asserting a timeliness defense to the widow's claim, as it had actual knowledge of a timely claim and willfully withheld it from the deputy commissioner. Moreover, the claim subsequently received by the deputy commissioner was timely as to the last payment to the putative widow. In the present case, however, no claim under the Act was filed with anyone until 2000, and there is thus no basis for precluding employer from raising the timeliness defense. In *Walker v. Rothschild Int'l Stevedoring Co.*, 526 F.2d 1137, 3 BRBS 6 (9<sup>th</sup> Cir. 1975), the claimant timely filed a doctor's report with the deputy commissioner. As a liberal interpretation is given to the types of writings that can constitute a "claim," *see McKinney v. O'Leary*, 460 F.2d 371 (9<sup>th</sup> Cir. 1972) (memorandum of a telephone call constitutes a claim), the Ninth Circuit affirmed the decision that the doctor's report stating that the claimant was disabled constituted a timely filed claim. As discussed above, the administrative law judge found that no such report was filed with the district director in a timely manner in this case. Consequently, as the administrative law judge properly found that lack of prejudice to employer does not toll the statute of limitations, and as claimant has raised no other error in the administrative law judge's finding that his claim is barred pursuant to Section 13(a), we affirm the denial of disability benefits.

Claimant also contends that the administrative law judge erred in not awarding an attorney's fee for establishing his entitlement to medical benefits. The right to seek medical

treatment is never time-barred. *Siler v. Dillingham Ship Repair*, 28 BRBS 38 (1994). Claimant, however, has not alleged that he needs additional medical treatment, that he sought authorization for treatment which was denied by employer, or that he incurred medical expenses which have not been reimbursed. Claimant can file a claim for medical benefits, if and when medical treatment becomes necessary, and claimant can receive a fee for the successful prosecution of such a claim. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5<sup>th</sup> Cir. 1993). The administrative law judge did not err in denying an attorney's fee at the present time, as claimant has not obtained medical benefits which were denied by employer. *Barker v. U. S. Dep't of Labor*, 138 F.3d 431, 32 BRBS 171(CRT) (1<sup>st</sup> Cir. 1998).

Accordingly, we affirm the administrative law judge's Decision and Order Denying the Claim.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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PETER A. GABAUER, Jr.  
Administrative Appeals Judge